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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERROL LANDON HORTON, Defendant and Appellant.	B202511 (Los Angeles County Super. Ct. No. BA299781)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Sarah J. Farhat, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Errol Landon Horton, appeals from the judgment entered following his conviction, by jury trial, for first degree murder with firearm use enhancements (Pen. Code, §§ 187, 12022.53).[1] Horton was sentenced to state prison for a term of 50 years to life.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we find the evidence established the following.

1. *Prosecution evidence.*

B.J. testified that on the afternoon of June 1, 2005,[2] he was at Rancho Park when he got a phone call from defendant Horton, whom he knew as "Braze." B.J. asked Horton for a ride home. Horton arrived in a white Pontiac Grand Am. When B.J. got in, Horton said he wanted to stop at Bells Liquor Store first. B.J. said okay.

At Bells Liquor, Horton walked into the store and left the keys in the ignition. B.J. got into the driver's seat and drove around to a rear parking lot where he made "donuts" in the dirt. After a while, B.J. drove to the front of the store, but he didn't see Horton inside. Then he saw Horton come out of the barbershop next door with a man subsequently identified as Jeffrey Williams. B.J. double parked and waited. At first, Williams and Horton were just talking, but then Williams started yelling and throwing his arms around. When Williams turned around and walked toward a yellow El Camino, Horton pulled out a gun and shot at him between four and seven times. Williams was hit once in the back, fatally.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] All further calendar references are to the year 2005 unless otherwise specified.

Horton ran to the Grand Am, hopped in and said, "I finally got that mother-fucker." B.J. drove for a while, then parked and ran home. The following day, when B.J. asked him why he had done it, Horton said Williams owed him money. He said they had mated dogs and were supposed to share the profits from the puppies, but that Horton had gone to jail and, when he got out, Williams wouldn't give him a share of the money.

Michael Hilbert worked at the barbershop. He testified he saw Horton, whom he recognized from the neighborhood, walk into the barbershop and sit down. Horton spoke to Williams for a while, and then the two of them walked outside and continued talking. At some point, they began to argue. Hilbert walked outside a couple of times and heard snatches of their conversation. They were talking about Horton's girlfriend staying at Williams's house. Horton said, "Why you put my girl out?" Williams said, "Well . . . I tried to help her. I didn't put her out. I didn't do anything." They also talked about a microwave oven. Horton accused Williams of having done him wrong.

Samuel Johnson testified he had been walking past the barbershop when he saw two men who looked like they were getting ready to fight. One man was throwing his hands up in the air and saying, "Man, I don't know what you trippin' about. Man, I gave your girl that microwave." Johnson then heard gunshots. The man who had thrown his hands in the air was near a yellow El Camino and falling down. Johnson ran over and grabbed him. Johnson testified Horton had been the other man in the argument.

Harlan Lee was up the street from the liquor store when he heard gunshots and then he saw a white Pontiac Grand Am driving toward him. He could see both the driver and the passenger. Lee testified Horton had been the passenger in the Grand Am.

Ladine Williams, the victim's wife, testified she had met Horton's girlfriend, Aleeseya Church, at the Men's Central Jail when Horton and Williams were both in custody. After Williams was released, he got some phone calls from the jail and an arrangement was made for Church and her child to move in with the Williams family. As part of this arrangement, Church was supposed to give Ladine some money. There was also something about the sale of the El Camino and puppies from Ladine's pit bull.

Ladine testified Church brought over boxes of clothes and food, as well as a microwave oven. But after the first day, Church did not return to the Williams house and she just left her belongings there. When Williams got out of jail a few weeks later, he told Church to come get her stuff and that he would put it by the side of the house. Then Horton called from jail. Ladine heard her husband tell him: "[W]e . . . had a deal . . . . Your girl was suppose to give my girl some money and she never gave her nothing. She moved all her stuff in here. . . . I'm not a storage, you know. I can't store . . . people's stuff for free. That's why we agreed for the arrangements. [¶] You said you wanted to buy the car. You wanted to get the blue pit, the puppy that . . . the dog was suppose to have. And you know what I'm saying, you didn't do your end of the bargain." Ladine could hear Horton yelling on the other end of the phone.

Ladine testified Church never paid her any money. Prior to the shooting, Church came to the house and retrieved her things. Two days before the shooting, Horton came to the house in a white Grand Am. He and Williams argued about making payments on the El Camino.

It was stipulated that Horton had purchased a white Pontiac Grand Am five days before the shooting.

2. *Defense evidence.*

Angelia Coyne had witnessed the shooting while standing in a telephone booth. She heard shots, saw a white Pontiac in the middle of the street and a man standing near the car with his arm outstretched. There was another man standing in front of a yellow El Camino. After the second shot, the man by the El Camino went down. The gunman got into the Pontiac and left. Coyne testified Horton was not the gunman.

Jovan Houston had been driving behind a white Pontiac. The car stopped and a man jumped out of the passenger side. He fired at least five shots at another man standing next to a yellow El Camino. Houston testified Horton did not look anything like the gunman.

CONTENTIONS

1. B.J.'s testimony should have been excluded because his police statement had been coerced.

2. There was insufficient evidence to prove the premeditation and deliberation elements of first degree murder.

3. Horton was denied a fair trial because the jury learned he was a gang member and had been arrested.

4. There was prosecutorial misconduct during closing argument.

5. The trial court erred by not giving, sua sponte, CALJIC No. 2.71 (viewing defendant's admission with caution).

6. The trial court erred by refusing to give CALJIC No. 2.01 (circumstantial evidence).

7. The trial court erred by giving CALJIC No. 2.21.2 (witness false in part of testimony).

8. The trial court erred by giving a faulty reasonable doubt instruction.

9. There was cumulative error.

10. The trial court erred by refusing to disclose jury identification information to the defense.

DISCUSSION

1. *Trial court did not err by admitting B.J.'s testimony.*

Horton contends the trial court erred by refusing to exclude B.J.'s trial testimony on the ground it was based on police statements that had been coerced. This claim is meritless.

a. *Factual background*.

B.J. testified that, a few hours after the shooting, he went back to where he had parked the car. He saw the Grand Am being towed and his friend Tommy Lavender being arrested. Other evidence showed Lavender was being arrested as a suspect in the Williams shooting, but that he was later released. On June 12, Horton, B.J. and several others were in an alley when

the police arrived. Horton ran and was arrested. Other evidence showed that the officers were arresting Horton for an unrelated robbery and that they were not involved in the Williams investigation. B.J., however, assumed Horton was being arrested for shooting Williams.

B.J. himself was initially picked up by the police for questioning on June 16, about two weeks after the shooting, and taken to a police station. He spoke to Detective Gordon and another detective. The detectives said he had been identified as the driver in the Williams shooting. B.J. insisted he had not been involved and the detectives released him. On September 13, the detectives interviewed B.J. at a youth camp where he had been sent after violating his probation. The detectives again said he had been identified as the driver and they suggested that perhaps he had been unaware of the gunman's plans. B.J. again denied being involved. He said anyone who had identified him as the driver was lying. He also said he heard that a man named Braze had been identified as the gunman. The detectives said they were getting ready to file charges in a couple of days and that, without the truth from B.J. about what happened, they would have to file charges against him. B.J. insisted he was telling the truth.

B.J. was subsequently transferred from the youth camp to Eastlake Juvenile Hall, where the detectives interviewed him on September 20. B.J. again denied any involvement. After the interview, B.J. spoke to his mother, who told him to tell the detectives the truth. B.J. asked his mother to arrange another interview, which she did. On September 21, the detectives returned for a fourth interview. This time, B.J. gave the same story he later gave at trial. He said he had previously lied about his involvement because he feared being killed for snitching.

Horton made a pretrial motion to exclude B.J.'s testimony and any evidence of his police statements. Horton argued the detectives had been coercive during the first three interviews, which rendered B.J.'s statements at the fourth interview involuntary. The trial court denied the motion, finding there had not been any coercion.

b. *Legal principles*.

"A defendant lacks standing to complain of the violation of a third party's Fifth Amendment privilege against self-incrimination," and may only complain "if such action adversely affects the reliability of testimony offered against the defendant at trial." (*People v. Jenkins* (2000) 22 Cal.4th 900, 965, 966.) "[T]he primary purpose of excluding coerced testimony of third parties is to assure the reliability of the trial proceedings . . . . [T]he defendant's emphasis on pretrial coercion 'misperceives the limited nature of the exclusion recognized for coerced third party testimony. [Citation.] Because the exclusion is based on the idea that coerced testimony is *inherently unreliable*, and that its admission therefore violates a defendant's right to a fair trial, this exclusion necessarily focuses only on whether the evidence actually admitted was coerced. . . . [D]efendant can prevail on his suppression claim only if he can show that the trial testimony given by [the third party] was involuntary at the time it was given.' [Citation.]" (*People v. Badgett* (1995) 10 Cal.4th 330, 347.)

"[T]here is a significant difference in the burden of proof applicable to a claim under the Fifth Amendment and defendants' claim that the testimony of a third party is subject to exclusion as a matter of due process. The burden is on the People to demonstrate the voluntariness of a defendant's admissions or confessions by a preponderance of the evidence. . . . By contrast, when a defendant makes a motion to exclude coerced testimony of a third party on due process grounds, the burden of proving improper coercion is upon the defendant. . . . Even assuming an out-of-court statement of a third party was the product of improper pressures, it cannot be the rule that the burden rests on the People to demonstrate that the taint of this statement was purged by the time the witness testified. Rather, a defendant must demonstrate that trial testimony following the coercion of a witness was actually tainted thereby." (*People v. Badgett, supra*, 10 Cal.4th at p. 348.)

c. *Discussion*.

Horton argues that by alternatively threatening to charge B.J. as a murderer and promising him leniency, the detectives coerced him into incriminating Horton at trial. However, not only has Horton failed to prove B.J.'s trial testimony was the product of coercion, he has not even proved there was coercion during the police interviews.

Horton has not shown there were any improper threats or promises of leniency during the interviews. The detectives merely pointed out that B.J.'s role as the driver might make him liable for murder, depending on what he knew about Horton's plans and what his own intentions were. It would have been proper for the prosecutor to charge B.J. with murder had there been evidence he was an accomplice.

Although Horton characterizes the tenor of the interviews as "unusually persistent," we have read the transcripts and agree with the trial court that there was no evidence of coercion. At the start of each interview B.J. was *Mirandized*[3] and he agreed to speak to the detectives. There is no claim the detectives did anything other than have normal conversations with B.J., albeit ones in which they persistently said they believed he was involved. But even had the questioning been more hostile than it apparently was, it is well-established that aggressive interrogation tactics do not necessarily constitute coercion. (See, e.g., *In re Joe R.* (1980) 27 Cal.3d 496, 515 [regarding interrogation of 17-year-old, trial court "had no duty to rule that loud, aggressive accusations of lying amounted to coercive threats"].)

Significantly missing from this record is any evidence of causation. A threat renders a confession involuntary "only if the threat actually induces [the person being interrogated] to make the statement." (*People v. Lucas* (1995) 12 Cal.4th 415, 442; see also *People v. Thompson* (1990) 50 Cal.3d 134, 166 [in cases of claimed psychological coercion, question is whether influences brought to bear overcame defendant's will to resist and resulted in confession not freely self-determined].) Similarly, an improper promise of leniency, express or implied, does not render a

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[3] (See *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602].)

statement involuntary unless, given all the circumstances, the promise was a motivating cause of the statement. (*People v. Vasila* (1995) 38 Cal.App.4th 865, 874; *People v. Cahill* (1994) 22 Cal.App.4th 296, 316.)

Although Horton postulates that the detectives' comments about filing murder charges coerced B.J.'s statements during the fourth interview, B.J. himself testified he decided to tell the truth because his mother was crying and "stressed out" about the whole situation, and because "[s]he just told me if I knew anything, just say it. Just, you know, just tell the truth." B.J. testified his mother "was really hurt and crying on the phone because I was going through this situation. . . . Every time she came to see me, every Sunday, she will cry. Every time I call her, she will cry. No matter what, she was crying." When he spoke to her after the September 20 interview, and said he did know something about the shooting, she urged him to tell the detectives what he knew. B.J. testified he did not feel threatened or frightened by the detectives during the interviews, and that he did not make much of their comments about filing murder charges against him. He told the truth during the fourth interview because his mother was so upset, not because the detectives had said they were going to file charges against him.

Horton failed to carry his burden of showing B.J.'s testimony resulted from improper coercion during the police interviews. (See *People v. Badgett, supra,* 10 Cal.4th at p. 348.)

2. *There was sufficient evidence of premeditation and deliberation.*

Horton contends there was insufficient evidence to prove he murdered Williams with premeditation and deliberation. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the

determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

" 'The test on appeal is whether a rational juror could, on the evidence presented, find the essential elements of the crime – here including premeditation and deliberation – beyond a reasonable doubt.' [Citation.] A first degree murder conviction will be upheld when there is extremely strong evidence of planning, or when there is evidence of motive with evidence of either planning or manner [of killing]. [Citations.]" (*People v. Romero* (2008) 44 Cal.4th 386, 400-401.)

People v. Anderson (1968) 70 Cal.2d 15, 26-27, discussed the following types of premeditation and deliberation evidence: "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing – what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of

considerations' rather than 'mere unconsidered or rash impulse hastily executed' [Citation.]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2). [¶] Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)."

b. *Discussion*.

Horton argues there was no evidence of premeditation and deliberation because the killing arose out of "a spontaneous escalating encounter" that erupted into a rash and sudden shooting. Not so. Even if Horton accidentally ran into Williams at the barbershop and got mad at him during the ensuing argument, a reasonable jury could have found that Horton decided with premeditation and deliberation *at that moment* to kill Williams. " 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . . " [Citations.]' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

The manner of killing tended to show premeditation and deliberation. The evidence showed Horton fired multiple times at Williams from a fairly close distance after Williams had turned his back on Horton and was walking away. (See *People v. Silva* (2001) 25 Cal.4th 345 369 ["The manner of killing – multiple shotgun wounds inflicted on an unarmed and defenseless victim who posed no threat to defendant – is entirely consistent with a premeditated and deliberate murder."]; *People v. Bolin* (1998) 18 Cal.4th 297, 332 [multiple gunshot wounds was manner of killing tending to show premeditation and deliberation].)

There was also overwhelming evidence of motive. The evidence showed Horton killed Williams during an argument which had arisen out of an ongoing dispute involving Horton's girlfriend, the sale of the yellow El Camino, and disputed profits from the sale of a pit bull puppy. There had been at least one earlier argument between the two men over the telephone. On the day of the shooting, they engaged in another argument outside the barbershop, during which Horton accused Williams of having done him wrong. When Williams walked away from the argument, Horton pulled out a gun and started shooting at him.

Particularly striking was Horton's conduct following the shooting. Immediately afterward he gloated, "I finally got that mother-fucker." The next day, he explained to B.J. precisely why he had wanted to kill Williams. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 767 [evidence of premeditation and deliberation included "testimony that after the killing defendant said that 'he had to do it' "]; *People v. Perez* (1992) 2 Cal.4th 1117, 1128 ["Additionally, the conduct of defendant *after* the stabbing . . . would appear to be inconsistent with a state of mind that would have produced a rash, impulsive killing."].)

In sum, there was ample evidence of premeditation and deliberation in this case.

3. *Horton was not denied a fair trial because the jury heard evidence of his gang membership and arrests*.

Horton contends he was denied a fair trial because the jury learned he was a gang member, that he had been arrested for an unrelated robbery, and that he had been in jail. This claim is meritless.

a. *Background*.

As discussed *ante*, B.J. saw Horton get arrested 11 days after the shooting. Although B.J. believed Horton was being arrested for killing Williams, he was actually being arrested on an unrelated robbery charge. Prior to trial, the parties agreed evidence about this arrest would be limited to the fact that Horton had been arrested on a charge unrelated to the Williams shooting. They also agreed that, when B.J. testified about Horton's tattoos, he would not say they were gang tattoos.

In his testimony, B.J. initially identified Horton by saying, "I know him by Braze. Everybody else know him by his real name, I guess." Later, the prosecutor sought to illustrate the extent of their relationship by asking B.J. if he knew where Horton lived, his girlfriend's name, or whether he had tattoos.

When the prosecutor asked B.J. why he had initially told the detectives he knew nothing about the shooting, B.J. testified: "Because my life was on the line. If I really say something, like I am today . . . somebody is going to try to do something to me after I leave out these courts." When it was revealed at sidebar that, during the lunch break, B.J. and a detective had seen members of the Pasadena Denver Lane gang checking out B.J. at the courthouse, defense counsel expressed concern about the jury hearing irrelevant gang evidence. The trial court agreed: "Yeah. How about just limiting it to he has received some stares from persons and he has been concerned about that, something to that effect, as opposed to getting into the gang component – [¶] . . . [¶] . . . I mean he has already stated that he didn't go to the police, or he wasn't honest about it in the first place because of fear for his life . . . ."

The trial court then told the jury that evidence about B.J.'s fears was being admitted only to help the jury evaluate his credibility, and that such evidence had nothing to do with Horton.[4] Immediately thereafter, the prosecutor asked B.J. if he had seen anyone he knew in the courtroom. B.J. testified, "I [saw] a couple of Braze's homeboys outside." When the prosecutor asked B.J. how he knew they were Horton's homeboys,

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[4] The trial court told the jury: "[Y]ou have heard some testimony on the part of the witness, [B.J.], concerning various concerns that he has that he mentions, and you are to consider those only for the purpose of assessing how, if at all, it relates to his candor and truthfulness and his general demeanor as a witness in this case. And you are not to consider it for any other purpose. [¶] There has been no demonstrative connection between any of these things and the defendant, so certainly do not hold it against the defendant in any respect whatsoever. Just . . . consider it for the purpose of assessing the witness with regard to the issues that I mentioned earlier."

defense counsel objected on grounds of lack of foundation, and the trial court addressed B.J.:

"The Court: Okay. How do you know they are his homeboys? [¶] They are friends or associates of the defendant's, to your knowledge? Is that correct?

"[B.J.]: Yes, They are from the same gang.

"The Court: Okay. And in the same group? They hang out together, as the expression goes, right?

"[B.J.]: Yes, sir."

At the next break, defense counsel asked "for a stronger admonition, because the gang stuff just came out." When the trial court replied, "I did rephrase that," defense counsel said, "But . . . the cat is out of the bag. Not that . . . it wasn't going to come out at some point, . . . there was going to be references to [the Pasadena Denver Lane gang] . . . ." The trial court noted it had tried to "spin" B.J.'s gang reference into "people [Horton] would hang out with," and opined the best cure for the erroneous gang reference would be a general admonition, rather than risk aggravating the harm by giving the gang reference undue emphasis.

At another point in his testimony, B.J. was asked how he had identified Williams's killer when he finally admitted to Detective Gordon that he had witnessed the shooting. B.J. testified, "I just told him it was the guy named Braze, the one I've been – the one we have been talking about since the beginning, the one he arrested for the robbery . . . ."[5] Sua sponte, the trial court told the jury: "And let me point out to you, ladies and gentlemen, that to the extent that there has been any description as to any specific offense that the defendant allegedly was arrested for, that is only offered for you to consider in

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[5] Although the officers who arrested Horton on the robbery charge knew nothing about the Williams shooting investigation, B.J. did not know that and he assumed, incorrectly, that Detective Gordon had been aware of Horton's robbery arrest when he began interrogating B.J.

determining the credibility of the witness in making identification of the defendant. It is not evidence that the defendant has committed any offense in particular."

In addition to these testimonial references to his gang membership and his arrest for robbery, Horton complains about several statements the jury heard while listening to the police tapes. At the initial June 16 interview, B.J. refers to Horton as Braze "from Pasadena Denver Lanes." At the September 13 interview, B.J. says that, after the first interview, he went back to his neighborhood and started asking questions. People told him the police had already arrested the gunman in the Williams shooting and that it was "[s]omebody named Braze."

At the September 20 interview, when Detective Gordon refers to B.J.'s mistaken belief that Horton had already been arrested for the shooting, B.J. tries to distance himself from Horton by saying, "I told you . . . his gang name, I don't know his real name. [¶] . . . [¶] You could ask Tommy [Lavender] his real name . . . ." B.J. goes on to say he only knew Horton through Lavender: "If Tommy wasn't there, I wasn't there, cause I don't know him like that." B.J. then describes Horton's tattoos: a D on the back of his left arm and an L on the back of his right arm, standing for "Denver Lanes."

Finally, at the September 21 interview, B.J. admits he witnessed the shooting. When he tells Gordon he had known Horton for a couple of months before the shooting, Gordon asks if Horton is a member of the P Stones gang and B.J. answers: "Naw, Braze. Braze (*inaudible*) Pasadena Denver Lanes."

When Ladine Williams was interviewed by the police, she said her husband told her that Horton was "a Blood."

After the close of evidence, the trial court told the jury: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admit[ted] you were instructed that [it] could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

b. *Discussion*.

Horton contends his right to a fair trial was violated because the jury heard these various references to his gang membership and criminal arrests. He argues that, despite the trial court's jury admonitions, the references "impermissibly reduced the People's burden of proof and created a substantial risk that appellant was convicted of murder . . . on the basis of bad character and other irrelevant and inflammatory misconduct, rather than the evidence of the charged offenses . . . ." Horton contends the jury should have been specifically instructed to disregard any references to his gang membership.
We disagree. The gang and arrest references were sparse and fleeting, and the trial court reasonably concluded the best cure would be a more general admonition less likely to draw attention to the references.

Horton complains that, after refusing to give a gang-specific admonition, the trial court would not let him put on evidence that B.J. belonged to the P-Stones gang. When the trial court told defense counsel, "I thought you were trying to keep this [i.e., gang references] out," the following colloquy occurred:

"[Defense counsel]: Well, to the extent that all parties have gang affiliation, I would like to kind of neutralize the situation.

"The Court: Well, you say to the extent. So you want to make that case?

"[Defense counsel]: No, it's not saying gang, gang, gang, It is like, you know what? It is a fact of everybody in this case, so it is not a big deal, right.

"The Court: That includes the defendant.

"[Defense counsel]: Right.

"The Court: So we are going to stipulate, then, that the defendant is a member of the gang and so is the witness?

"[Defense counsel]: No, no, no."

The trial court then commented: "[B]ecause there might have been an error or two doesn't mean we open it up all together as to either the defendant or someone else. [¶] I mean, you want to throw the baby out with the bath water here? I just want to make sure the jurors consider what is properly [to be] considered."

Thus, the record demonstrates defense counsel made a tactical decision to forego an explicit stipulation to the effect that both Horton and B.J. were gang members. This may have been because defense counsel knew the police tapes also contained references to B.J.'s gang membership and criminal record: during the June 16 police interview, B.J. said he was currently on probation for a gun-related offense and that he was a member of the Black P-Stones gang. Moreover, while cross-examining B.J., defense counsel had already elicited the additional information that B.J. had been on probation for possession of a loaded gun.

Hence, the jury was aware that both Horton and B.J. were in gangs and that they both had criminal records. So far as the Williams shooting was concerned, however, there was no allegation that it had been gang-related and the prosecutor never tried to use the gang evidence, what little of it there was, to establish either Horton's identification as the gunman or his state of mind when he killed Williams. To the extent the jurors might have looked with disfavor upon Horton because they learned he had a criminal record and belonged to the Pasadena Denver Lanes gang, they presumably would have reacted the same way upon learning that B.J. belonged to the Black P-Stones gang and had committed crimes. And, in addition to B.J.'s testimony, Horton was placed at the crime scene by three other witnesses, one of whom was acquainted with him from having seen him around the neighborhood.

We conclude the references to Horton's gang membership and criminal record do not warrant reversal of his conviction.

4. *Horton's prosecutorial misconduct claims are meritless.*

Horton contends his conviction must be reversed because the prosecutor committed misconduct during closing argument. This claim is meritless.

" ' "[T]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom." ' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 752.) "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.

[Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970.)

As a general rule, "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ' "an admonition would not have cured the harm caused by the misconduct." ' " (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

a. *Gang reference.*

Horton claims the prosecutor committed misconduct when she "reminded jurors [B.J.] told police he knew the guy by 'his gang name.' " We disagree. Contrary to Horton's suggestion, the prosecutor was not flaunting this gang reference. Rather, the remark occurred while the prosecutor was meticulously recounting B.J.'s interactions with the investigating detectives in order to bolster the credibility of his eventual statement that he had seen Horton shoot Williams.[6] As Horton acknowledges, the prosecutor was merely retelling the story told by the police tapes. Moreover, it was an isolated and fleeting remark (see e.g., *People v. Huggins* (2006) 38 Cal.4th 175, 206-208 [prosecutor's brief reference to biblical judgment day, if misconduct, was de minimus and did not prejudice defendant]) and there was no defense objection.

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[6] The prosecutor told the jury: "But what happened is that same month [B.J. is] now in Eastlake Juvenile . . . . [Detective] Gordon goes and visits him again and he starts out and . . . . 'Why don't you just tell me? You . . . told me you knew who the shooter was. Why don't you just tell me?' And [B.J.] goes 'I told you. I don't know his real name. I know his gang name'. [¶] You heard it, you can hear it again back in the jury room. He told him it's Braise [*sic*]. He started giving details. He denies that he's actually the driver, but now he describes him and he gives enough information . . . ."

b. *Vouching*.

Horton contends the prosecutor improperly vouched for the testimony of B.J. and Ladine Williams. This claim is meritless.

"A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching." (*People v. Frye, supra*, 18 Cal.4th at p. 971.)

Horton contends the prosecutor committed misconduct by suggesting B.J. must have been telling the truth because he had entered into an immunity agreement. The prosecutor told the jury: "[Y]ou can have this immunity agreement for yourself to look over.[7] His only requirement is that he testify truthfully. And he told you that on the stand. [¶] That's in May of 2007. And now we're at trial here a few months later and he comes forward and he testifies truthfully pursuant to the agreement[,] tells you what happened." The prosecutor later said: "And lastly I'm going to talk about [B.J.] because, of course, it's all about [B.J.]. If he's telling the truth and he's got – he was told to do so in the letter from immunity [*sic*] . . . ."

These remarks did not constitute impermissible vouching. In *People v. Bonilla* (2007) 41 Cal.4th 313, the prosecutor said of an immunized witness, " '[T]he agreement says he has got to testify truthfully, otherwise there is no deal. That is the trade-off,' " and " '[H]e has got to testify under oath, otherwise his deal doesn't work. It has got to be

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[7] The jury did request and receive a copy of B.J.'s immunity agreement during deliberations.

truthful.' " (*Id*. at p. 335, italics omitted.) *Bonilla* held these arguments "were no more than permissible comment about inferences the jury could draw from evidence in the record," "arguments that [the witness] should be believed because he had an incentive to tell the truth under the terms of his plea agreement . . . . They did not suggest the prosecutor had personal knowledge of facts outside the record showing [the witness] was telling the truth. Nothing in the challenged remarks invited the jury to abdicate its responsibility to independently evaluate for itself whether [the witness] should be believed." (*Id*. at pp. 334, 337-338.)

Horton complains that, when the prosecutor asserted B.J. had testified truthfully "pursuant to the agreement," she went beyond merely arguing B.J. had an incentive to tell the truth. But we do not think a reasonable juror would have understood the comment to mean the prosecutor had personal knowledge of facts outside the record showing B.J. was telling the truth, and was therefore inviting the jury to abdicate its responsibility to determine B.J.'s credibility.

After defense counsel attacked Ladine Williams's credibility during closing argument, the prosecutor responded by saying: "Of course she has to disassociate the defendant from the motive. And she attempted to do so cause what she tells you is Ladine is lying. So . . . as you go through this you'll understand in order . . . to poke holes in the People's case, she has to establish that a lot of people are lying. It just doesn't work that way. People generally don't lie, especially when called to the stand." Horton claims this constituted improper vouching. But closing argument " ' "may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience" ' " (*People v. Hill, supra,* 17 Cal.4th at p. 819.) We think the prosecutor was doing nothing more than invoking the commonly held belief that most people do not lie under oath. Contrary to Horton's argument, we do not think a reasonable jury would have believed the prosecutor was implying she knew as an empirical matter just how frequently witnesses commit perjury.

c. *Comments regarding reasonable doubt standard.*

Horton contends his conviction must be reversed because the prosecutor misstated the reasonable doubt standard. Misstating the prosecution's burden of proof during closing argument can constitute misconduct. (*People v. Hill, supra,* 17 Cal.4th at p. 831 [prosecutor committed misconduct "insofar as her statements could reasonably be interpreted as suggesting to the jury she did not have the burden of proving every element of the crimes charged beyond a reasonable doubt"].)

Here, it was defense counsel who first commented on the reasonable doubt standard during closing argument, saying: "Now the burden is a great burden. Reasonable doubt when we were talking about it in jury selection, the judge was talking about how there's a preponderance of the evidence standard and that's like a 50/50 standard. And how beyond a reasonable doubt is greater than that and it's much greater than that." After reading part of the jury instruction aloud, defense counsel said, "It's really . . . verbose but really what it's saying is you can't convict unless you feel an abiding conviction. An abiding conviction is a strong conviction. . . . [A]n abiding conviction you got to believe after a day, after a week, after ten years that you made the right decision. Because the burden it's very profound, it's a profound task that you got in front of you."

The prosecutor responded by saying: "Let me just talk to you briefly about beyond a reasonable doubt, because you have an instruction that defines that. And no one knows what it is. Because it's based on . . . your own feelings of reasonableness, common sense. Goes back to what the judge voir dired on. What makes sense. [¶] When you talk about beyond a reasonable doubt, the defense counsel said it's profound. When you go back in the jury room you're going to be asked to look at the evidence and come to a conclusion, based on reasonable doubt. You do it everyday. You walk across the street, you look both ways, you make sure there's no car coming. Your safety's at risk. [¶] You're coming to court, you stop at the red light and you start going when it's green because you reasonably assess the fact that you can go, it's going to be safe. That is a decision made beyond a reasonable doubt. So it's done on a daily basis."

Horton cites *People v. Nguyen* (1995) 40 Cal.App.4th 28, which condemned equating the reasonable doubt standard with making everyday decisions like changing lanes in traffic. Horton argues that "[a]s in *Nugyen*, these powerful uncorrected comments 'trivialize[d] the reasonable doubt standard' by equating it with everyday decisions like crossing the street which are 'almost reflexive.' " But although *Nguyen* held that comparing the reasonable doubt test to everyday life decisions was improper, it did not reverse the defendant's conviction: "We strongly disapprove of arguments suggesting the reasonable doubt standard is used in daily life to decide such questions as whether to change lanes or marry. The argument is improper even when the prosecutor, as here, also states the standard for reasonable doubt is 'very high' and tells the jury to read the instructions. Had Nguyen objected to the prosecutor's argument, the court surely would have sustained his objection and admonished the jury. [¶] Nguyen, however, did not object. Since an objection here and admonition by the court would have cured the error, Nguyen waived the issue for appeal. Moreover, we conclude Nguyen was not prejudiced since the prosecutor did direct the jury to read the reasonable doubt instruction and the jury was correctly instructed on the standard. We must presume the jury followed the instruction and that the error was thereby rendered harmless." (*Id*. at pp. 36-37, fn. omitted.)

Here, as in *Nguyen*, there was no objection from Horton and the prosecutor referred the jury to the trial court's reasonable doubt instructions.[8] (See *People v. Valdez* (2004) 32 Cal.4th 73, 114, fn. 14 ["With respect to the prosecutor's argument to the jury, we presume the jury followed the court's instructions and not the argument of counsel."].) The prosecutor's comments do not warrant reversal of Horton's conviction.

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[8] Contrary to Horton's assertion that the prosecutor did not refer jurors to the correct instruction, the prosecutor told them "you have an instruction that defines [reasonable doubt]," and referred to the trial court's discussion of reasonable doubt during jury voir dire.

5. *Instruction on oral admissions was not required.*

Horton contends his conviction must be reversed because the trial court erred by failing to instruct, sua sponte, with CALJIC No. 2.71 or a similar instruction advising jurors to view his oral admissions with caution. This claim is meritless.

CALJIC No. 2.71 must be given by the trial court sua sponte whenever evidence of a defendant's oral admissions are introduced at trial. (*People v. Marks* (1988) 45 Cal.3d 1335, 1346.) "A trial court has a sua sponte duty to instruct the jury to view a defendant's oral admissions with caution if the evidence warrants it. [Citations.] To determine prejudice, '[w]e apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given.' [Citation.] Because the cautionary instruction's purpose is ' "to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]" [Citation.]' [Citation.]" (*People v. Wilson* (2008) 43 Cal.4th 1, 19.)

Horton claims the instruction was necessary so the jurors would know how to evaluate the following evidence: B.J.'s testimony that Horton told him why he shot Williams; Ladine Williams's testimony that she heard her husband and Horton arguing about a car; and, Samuel Johnson's testimony that he overheard Horton and Williams arguing about a girl and a microwave.

However, most of this evidence would not have been covered by CALJIC No. 2.71. Ladine Williams did not testify to an oral admission by Horton. She had overheard her husband's end of a phone conversation with Horton and she testified she could hear Horton *yelling* on his end of the phone. Ladine did not attribute any particular words or statements to Horton. Similarly, Johnson merely testified to the gist of the argument between Horton and Williams outside the barbershop, apparently on the basis of statements made by Williams, not Horton.

In any event, like B.J.'s testimony that Horton said he shot Williams because Williams owed him money, all of this evidence was basically uncontroverted and, therefore, harmless. (See *People v. Stankewitz* (1990) 51 Cal.3d 72, 94 [no prejudice where "testimony concerning defendant's oral admission was uncontradicted; defendant adduced no evidence that the statement was not made, was fabricated, or was inaccurately remembered or reported" and "[t]here was no conflicting testimony concerning the precise words used, their context or their meaning"].)

The failure to give CALJIC No. 2.71, or a similar instruction, does not warrant reversing Horton's conviction.

6. *General circumstantial evidence instruction was not required.*

Horton contends the trial court erred by giving CALJIC No. 2.02 (circumstantial evidence to prove specific intent) instead of CALJIC No. 2.01 (circumstantial evidence generally). This claim is meritless.

"[T]he obligation to give CALJIC No. 2.01 arises only in those cases where circumstantial evidence is ' "substantially relied on for proof of guilt." ' [Citation.] 'The reason for this rule is found in the danger of misleading and confusing the jury where the inculpatory evidence consists wholly or largely of direct evidence of the crime. [Citation.]' [Citation.] '*Extrajudicial admissions, although hearsay, are not the type of indirect evidence as to which the instructions on circumstantial evidence are applicable*. [Citation.]' [Citation.]" (*People v. Wright* (1990) 52 Cal.3d 367, 406, italics added; see also *People v. Gould* (1960) 54 Cal.2d 621, 629, disapproved on other grounds by *People v. Cuevas* (1995) 12 Cal.4th 252, 257 ["[Circumstantial evidence] instructions should not be given when the problem of inferring guilt from a pattern of incriminating circumstances is not present."].) Hence, if the prosecution does not substantially rely on circumstantial evidence to prove guilt, then neither CALJIC No. 2.01 nor CALJIC No. 2.02 is required.

The crucial incriminating evidence against Horton was either direct evidence, i.e., B.J.'s testimony that he saw Horton shoot Williams, and the testimony from Hilbert, Johnson and Lee putting Horton at the crime scene, or extra-judicial admissions, i.e.,

B.J.'s testimony that immediately after the shooting Horton said, "I finally got that mother-fucker," and later explained he had shot Williams in a dispute over money. Hence, there was no error because no circumstantial evidence instruction was required.

7. *Trial court did not err by giving CALJIC No. 2.21.2.*

Horton contends the trial court erred by instructing the jury with CALJIC No. 2.21.2 because it lowered the prosecution's burden of proof. As Horton concedes, however, our Supreme Court has already rejected this claim.

CALJIC No. 2.21.2 provides: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars."

Our Supreme Court has repeatedly rejected the claim that the "probability of truth" language in this instruction "impermissibly lightened the prosecution's burden of proof, because it allowed the jury to assess prosecution witnesses by seeking only a probability of truth in their testimony . . . ." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1139; see also *People v. Nakahara* (2003) 30 Cal.4th 705, 714 ["Defendant contends [CALJIC No. 2.21.2] 'allowed the jury to assess prosecution witnesses by seeking only a probability of truth in their testimony.' But as we have held, the targeted instruction says no such thing."].)

8. *Reasonable doubt instruction proper.*

Horton contends the trial court erred by instructing the jury on reasonable doubt with CALJIC No. 2.90 (1994 rev.). This claim is meritless.

This standard reasonable doubt instruction provides: "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

Although the instruction omitted the phrases "and depending on moral evidence" and "to a moral certainty" found in a previous version of CALJIC No. 2.90, this formulation was approved by our Supreme Court in *People v. Freeman* (1994) 8 Cal.4th 450, 504 and fn. 9; see also *People v. Cochran* (1998) 62 Cal.App.4th 826, 833 [removal of terms "to a moral certainty" and "depending on moral evidence" did not unconstitutionally reduce People's burden of proof]), and giving it did not constitute error.

9. *Cumulative error claim is meritless.*

Horton contends the cumulative prejudicial effect of the various trial errors he has raised on appeal requires the reversal of his conviction. However, we have found at most only a few insignificant errors that were clearly harmless. Horton's trial was not fundamentally unfair. (See *People v. Jenkins, supra,* 22 Cal.4th at p. 1056 ["Defendant contends the cumulative prejudicial effect of the various errors he has raised on appeal requires reversal of the guilt and penalty judgments. We have rejected his assignments of error, with limited exceptions in which we found the error to be nonprejudicial. Considered together, any errors were nonprejudicial. Contrary to defendant's contention, his trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred."].)

10. *Access to jurors' personal identification information properly denied.*

Horton contends the trial court erred by denying his application for disclosure of jurors' personal identification information in order to prepare a new trial motion. This claim is meritless.

a. *Legal principles.*

A trial court's denial of a petition to disclose juror identification information is reviewed for abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317.) To demonstrate good cause for the release of juror identification information pursuant to Code of Civil Procedure section 237, subdivision (b), a defendant must "set[] forth a sufficient showing to support a reasonable belief that jury misconduct occurred . . . ." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552; accord *People v. Jefflo* (1998)

63 Cal.App.4th 1314, 1321, fn. 8.) Furthermore, the misconduct alleged must be " 'of such a character as is likely to have influenced the verdict improperly.' " (*Id*. at p. 1322.) A petition to disclose juror identification information must be supported by more than mere speculation and may not be used as a " 'fishing expedition' by parties hoping to uncover information to invalidate the jury's verdict." (*People v. Rhodes, supra,* 212 Cal.App.3d at p. 552.)

A trial court does not have a duty to investigate every possible instance of juror misconduct. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419.) "[W]hen a criminal defendant moves for a new trial based on allegations of jury misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations. We stress, however, that the defendant is not entitled to such a hearing as a matter of right. Rather, such a hearing should be held only when the trial court, in its discretion, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact." (*Id*. at p. 415; see *People v. Ray* (1996) 13 Cal.4th 313, 343 ["The decision whether to investigate the possibility of juror bias, incompetence, or misconduct – like the ultimate decision to retain or discharge a juror – rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial."].)

b. *Discussion*.

After the jury found Horton guilty, defense counsel sought access to the jurors' personal identification information in order to file a new trial motion based on the following incident. During presentation of the defense case, an alternate juror sent the trial court a note saying: "I'm sure you all know this but just in case, juror number ten sleeps all day. He has been sleeping throughout the trial. People in the audience and other jurors have noted this."

In response to defense counsel's request for the juror identification information, the trial court made reference to an unreported bench conference which had taken place when the court got the alternate's note. The trial court told defense counsel, "And I do recall the sentiment that we all had or at least certainly I had and I felt very strongly, you

shared it with the court was that whereas there may have been some concern on the part of the alternate, it didn't seem to be of such a nature given our observations that any further action was necessary." The trial court continued, "I didn't note anything that would cause me any concern. And in fact, my recollection . . . is that this just didn't rise to such a point as to deserve any additional comment or attention on the part of any one of us. So we were at least implicitly quite satisfied that the juror was participating. [¶] . . . [¶] Now as to why we received this note in the first place, I don't know. I didn't see anything that would justify the alternate's writing this note."

After the bailiff indicated he did not recall seeing any evidence that a juror was sleeping, the trial court concluded: "Well I know the juror wasn't asleep quite frankly. I mean, let's just be very direct about it. I mean, I would notice something like that and I have before on other cases where that kind of issue has been presented. And I didn't see any evidence of anything like that. [¶] When I did bring this to everyone's attention, the very clear decision, very unambiguous on everyone's part was that this whole notion should be rejected. That there just wasn't any ostensible basis for the claim that the alternate made."

Horton now argues the trial court erred by denying his request for juror identification information without at least holding a hearing or sending out a follow-up questionnaire to the jurors. We disagree.

"We have observed that '[a]lthough implicitly recognizing that juror inattentiveness may constitute misconduct, courts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial. In fact, not a single case has been brought to our attention which granted a new trial on that ground. Many of the reported cases involve contradicted allegations that one or more jurors slept through part of a trial. Perhaps recognizing the soporific effect of many trials when viewed from a layman's perspective, these cases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during

material portions of the trial. [Citations.]' " (*People v. Bradford* (1997) 15 Cal.4th 1229, 1349[9]; see, e.g., *People v. Lee Yick* (1922) 189 Cal. 599, 609-610 [where trial court, presented with conflicting declarations about sleeping juror, declined to replace the juror, reviewing court assumed juror had not been asleep].)

People v. DeSantis (1992) 2 Cal.4th 1198, held the trial court did not err by failing to conduct a formal hearing into defense counsel's allegation that jurors were sleeping: "The record reveals that the court was constantly alert to the danger of jurors' dozing and observed the allegedly offending members closely. It found that none was dozing and made specific observations to that effect in the case of Jurors S. and J. Thus . . . *the court did undertake a self-directed inquiry, short of a formal hearing*, that recognized the conflict between the need for a fair trial by 12 competent jurors and the undesirability of interrupting the proceedings whenever a question of juror inattention is raised. We believe the court's self-directed inquiry was adequate under the state and federal Constitutions and state law, and find no error." (*Id.* at p. 1234, italics added.)

We conclude that here, much like in *DeSantis*, the trial court's self-directed inquiry at the time the issue was initially raised was sufficient to protect Horton's right to a fair trial. The alternate juror's observations were apparently uncorroborated, and the trial court was very certain Juror No. 10 had not been sleeping. In these circumstances, the trial court did not abuse its discretion by denying the juror identification information without undertaking further investigation into the alleged juror misconduct.

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9 In *Bradford*, the trial court first pointed out that a juror was sleeping. When defense counsel commented, " 'The juror was asleep all day yesterday, also,' " the trial court said, " 'I know.' " (*People v. Bradford, supra,* 15 Cal.4th at p. 1348.) *Bradford* held the trial court had not abused its discretion by not conducting an inquiry: "[T]he record reveals no more than that the juror had fallen asleep on the day in question and appears to have been asleep one day earlier; it does not appear that the juror continued to fall asleep or had been asleep for a longer period of time." (*Id.* at pp. 1348-1349.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.